No. 65.

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RUDOLF HELWIG, PLAINTIFF IN ERROR,
v.
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ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE UNITED STATES.

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STATEMENT OF FACTS.

The essential facts in this case are these: Helwig made three importations of wood pulp during the year 1895 and paid the regular duties on their invoiced valuation. The merchandise was subsequently appraised and found to have been undervalued by more than 10 per cent, whereupon there became due from the importer not only the regular duties upon the increased valuation, but also, under the provisions of section 7 of the customs administrative act of June 10, 1890, a "further sum" equal to 2 per cent of the total appraised value for each 1 per cent that the appraised value exceeded the value declared in the entry.

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Helwig paid the additional regular duties, but did not pay the "further sum." Suit was accordingly brought in the United States circuit court, where the case was tried on an agreed statement of facts, resulting in a judgment in favor of the United States. The plaintiff in error contended that the action was to recover penalties arising under the customs laws, and therefore that the circuit court had no jurisdiction. The action was taken from the circuit court on writ of error to the circuit court of appeals for the second circuit, which court now certifies the question of jurisdiction to this court for determination.

QUESTION.

Has the United States circuit court jurisdiction of an action to recover the aforesaid "further sum" accruing "in addition to the duties imposed by law," under the provisions of section 7 of the act of June 10, 1890, 26 Stat., 131? (Record, p. 3.)

ARGUMENT.

I.

The deliberate and continuing intention of Congress, as evidenced by the wording of the statutes themselves, including the latest legislation on the subject, is that these "additional duties" or "further sums" are to be considered and treated as duties and not as penalties.

It will be instructive to examine the language of prior acts relating to the levying of additional duties for undervaluation. The point to be borne in mind in the review of these statutes is not whether, in view of the restrictive tendency of these provisions, they might

not in the broadest sense of the term be considered as penalties, but in what light did Congress intend that they should be considered. Was it the intention of Congress that they should be treated as duties or as penalties?

Section 11 of the act of April 20, 1818 (3 Stat., 436), provided that where the appraised value of imported merchandise exceeded the invoice value by 25 per cent, then, "*in addition* to the 10 or 20 per centum * * * laid upon correct and regular invoices according to law, *there shall be added 50 per cent on the appraised value*," etc.

Section 25 of the same act provides:

> That all *penalties and forfeitures incurred by force of this act* shall be sued for, recovered, distributed, and accounted for in the manner prescribed in the act [of March 2, 1799, ch. 22, 1 Stat., 627] and may be mitigated or remitted in the manner prescribed by [the act of March 3, 1797, 1 Stat., 506].

Evidently this does not refer to the 50 per cent increase in the valuation of the articles undervalued. That was distinctly a duty and was to be collected as such. This is a penalty to be recovered by suit and to be distributed and accounted for accordingly.

Attorney-General Wirt held (5 Op., 731):

> It is very manifest that by the manner of wording the twenty-fifth section of this law they have confined the mitigating and remitting power of the Secretary of the Treasury to such penalties and forfeitures as are, according

> to *the provisions of this act, to be recovered by suit;* and consequently that his mitigating and remitting power does not extend to the 50 per cent which is, in certain cases, to be added to the appraisement, *because this is not to be recovered by suit.*

Undoubtedly this is the correct view of the matter, and if the distinction here laid down is kept clearly in mind, that unless the duty is recoverable by suit in the same manner as other fines and penalties it is not a penalty within the meaning of the statute giving jurisdiction to the United States district courts, the solution of the question in hand will not be difficult.

The act of March 1, 1823 (3 Stat., 734), contained (sec. 13) the same language as that quoted above from section 11 of the act of 1818, with a proviso referring to "the said penalty of 50 per cent."

The fact is, nevertheless, that the act itself levies a duty and not a penalty, and it is collected as such. It is a duty which burdens like a penalty, and was sometimes referred to as a penalty; but it was not a penalty in any statutory sense, was not collected as a penalty, and in no recent statute is it ever referred to as a penalty.

Section 9 of the act of May 19, 1828 (4 Stat., 274), provides that where the appraised value exceeds the invoice value by 10 per cent, then, in addition to the regular duties—

> *There shall be levied and collected* on the same goods, wares, and merchandise *fifty per centum of the duty so imposed* on the same goods, wares,

and merchandise, when fairly invoiced: *Provided, always*, That nothing in this section contained shall be construed to impose the *last-mentioned duty of fifty per centum*, for a variance between the bona fide invoice of goods produced in the manner specified in the proviso to the eighth section of this act, and the current value of the said merchandise in the country where the same may have been originally manufactured or produced: *And, further*, That the *penalty of fifty per centum* imposed by the thirteenth section of the act entitled "An act supplementary to and to amend an act entitled 'An act to regulate the collection of duties on imports and tonnage, passed the second day of March, one thousand seven hundred and ninety-nine, and for other purposes,' approved March first, one thousand eight hundred and twenty-three" (3 Stat., 734), shall not be deemed to apply or attach to any goods, wares, or merchandise which shall be subject to the *additional duty of fifty per centum*, as aforesaid, imposed by this section of the act.

This is the first instance of an additional duty for undervaluation distinctly levied as an "additional duty." The two former acts, it will be observed, did not strictly levy an additional duty, but merely collected regular duties on an increased valuation. Under this act (the act of 1828) the additional duty is described as a *duty*, but in the second proviso, where reference is made to the act of 1823, the duty is described as a penalty. The reason for this distinction is not clear, but that the distinction was intentional is apparent from the fact

that later in the same proviso where the additional duty of the law of 1828 is referred to it is described as an "*additional duty.*"

In no subsequent act imposing additional duties are the duties referred to as penalties. Thus we have the important fact that *Congress has never imposed these additional duties under any other designation or description than as duties or "further sums," never as a penalty;* and for seventy years has not even referred to them as penalties.

The language of section 17 of the act of August 30, 1842, is substantially the same as that of section 9 of the act of 1828, omitting the provisos.

Attorney-General Legare, referring to that act in an opinion dated June 7, 1843 (4 Op., 182), states: "I am very clear that the 50 per cent in addition to the duty imposed by law on the description of goods mentioned in the last proviso of the seventeenth section of the act of 1842 is a penalty." No reason is given for this conclusion. It is worthy of observation, however, that the very next act of Congress on the subject (act of February 11, 1846, ch. 7, sec. 3, 9 Stat., 3; sec. 2948 R. S.) directly provides "that no portion of [these] additional duties * * * shall be deemed a fine, penalty, or forfeiture for the purpose of being distributed to any officer of the customs."

Section 8 of the act of July 30, 1846 (9 Stat., 43), and section 7 of the act of March 3, 1865 (13 Stat., 494, carried into the Revised Statutes as section 2900), follow the wording of section 17 of the act of 1842.

Then came the act under which this suit is brought,

in which the additional duty is described as a "further sum." (Act of June 10, 1890, 26 Stat., 131, 134.)

> And if the appraised value of any article of imported merchandise shall exceed by more than *ten per centum* the value declared in the entry, *there shall be levied, collected, and paid,* in addition to the duties imposed by law on such merchandise, *a further sum* equal to two per centum of the total appraised value for each one per centum that such appraised value exceeds the value declared in the entry; and the additional duties shall only apply to the particular article or articles in each invoice which are undervalued; and if such appraised value shall exceed the value declared in the entry *more than forty per centum* such entry may be held to be *presumptively fraudulent,* and the *collector of customs may seize such merchandise and proceed as in cases of forfeiture for violations of the customs laws;* and in any legal proceedings which may result from such seizure the fact of such undervaluation shall be presumptive evidence of fraud, and the burden of proof shall be on the claimant to rebut the same, and forfeiture shall be adjudged unless he shall rebut said presumption of fraudulent intent by sufficient evidence.

The following is the most recent legislation on the subject, and is valuable chiefly as showing the continuing intention of Congress on the subject:

July 24, 1897, chapter 11, section 32 (30 Stat., 212):

> And if the appraised value of any article of imported merchandise subject to an ad valorem

duty, or to a duty based on or regulated in any manner by the value thereof shall exceed the value declared in the entry, there shall be levied, collected, and paid, in addition to the duties imposed by law on such merchandise, *an additional duty* of one per centum of the total appraised value thereof for each one per centum that such appraised value exceeds the value declared in the entry, but the *additional duties* shall only apply to the particular article or articles in each invoice that are so undervalued, and shall be limited to fifty per centum of the appraised value of such article or articles. *Such additional duties shall not be construed to be penal*, and shall not be remitted, nor payment thereof in any way avoided, except in cases arising from a manifest clerical error, nor shall they be refunded in case of the exportation of the merchandise, or on any other account, nor shall they be subject to the benefit of drawback: *Provided*, That if the appraised value of any merchandise shall exceed the value declared in the entry by *more than fifty per centum*, except when arising from a manifest clerical error, such entry *shall be held to be presumptively fraudulent*, and the collector of customs shall seize such merchandise and proceed as in case of forfeiture for violation of the customs laws.

Does any of the expressions in the acts above referred to convey the slightest hint that these duties are penalties, or that Congress intended them to be considered as penalties? If it had been the intention of Congress to consider and treat these impositions as penal-

ties, is there any good reason why they should not have been named fines and penalties?

There can be but one answer to these questions. Congress did have some object in selecting these expressions. If there is one thing clearer than any other in the study of these statutes, it is the fact that Congress deliberately *did intend*, and it is the *continuing intention* of Congress, that these additional duties should be considered and treated as duties, and this includes the method of their recovery.

II.

Whenever the statutes impose a customs or other penalty, such language is employed as can convey no other meaning.

A few instances are here given by way of illustration:

Section 2809, Revised Statutes—articles found in passengers baggage, etc. The person shall

> be *liable to a penalty* of treble the value.

Section 2809, Revised Statutes—merchandise not on the manifest of the vessel:

> the master *shall be liable to a penalty* equal to the value.

Section 2865, Revised Statutes—passing false invoice through the custom-house:

> every such person, his, her, or their aiders and abettors, *shall be deemed guilty of a misdemeanor and* on conviction *shall be fined* in any sum not exceeding five thousand dollars.

Section 3050, Revised Statutes—false entry for benefit of drawback:

> all such merchandise or the value thereof to be recovered of the owner or person making such entry, *shall be forfeited*, and the person making such false entry *shall also forfeit a sum* equal to the value of the articles mentioned or described in such entry.

Section 3111, Revised Statutes—failure to make entry and pay duties on saloon stores of a vessel. The owner

> *shall be liable to a penalty* of not less than one hundred dollars.

Act of June 10, 1890, section 9 (26 Stat., 135): owner, etc., who shall make or attempt to make entry by means of false invoice, etc., the merchandise or its value to be forfeited and the person—

> *shall, upon conviction be fined* for each offense a sum not exceeding five thousand dollars.

(Same act, section 6):

> Any person who shall knowingly make any false statement in the declarations * * * *shall*, on conviction thereof, *be punished by a fine* not exceeding five thousand dollars.

These instances may be multiplied, and it will be found that whenever a fine or penalty, properly so called and coming within the meaning of section 563, Revised Statutes, is imposed, the language of the statute is uniformly explicit and clear.

III.

The almost uninterrupted practice of the Treasury Department has been to treat these "additional duties" or "further sums" as duties and not as penalties.

Section 369 of the Treasury Regulations of 1857 provides that—

> *Additional duties* incurred as above *can not be distributed among the officers of the customs* and informers, *as fines, penalties, or forfeitures;* but belong wholly to the United States.

See also to same effect section 494, Customs Regulations of 1874. This section is based upon the act of February 11, 1846, chapter 7, section 3 (9 Stat., 3), which is codified in the Revised Statutes as section 2948.

Treasury Regulations of 1857, section 368; 1874, section 494; 1884, article 571; and 1892, article 897, all provide that additional duty for undervaluation is not subject to rebate or drawback upon exportation of the goods. This, seemingly, is opposed to the proposition laid down that the practice of the Treasury Department has been to treat these "additional duties" as duties. The question naturally suggests itself that if these impositions are duties and not penalties, why are they not subject to drawback the same as other customs duties.

In the first place, all other customs duties are not subject to drawback, as in cases of discriminating duties and in all preparations of opium (article 119, Customs Regulations of 1892, citing statutes, etc.).

Drawback is wholly a matter of favor on the part of the United States. The primary reason why it is not allowed in case of additional duties is that if it were allowed it would not only occasion the Government largely increased expenditure in the collection of its customs revenues, but would most effectually frustrate the very object for which additional duties are imposed. For while not penalties they are checks on carelessness and fraud, and properly are not returnable on exportation as in an honest claim for drawback.

"Additional duties" or "further sums," as they are termed in the statute under consideration in this case, are imposed for the purpose of causing the importer to see that his goods are entered at a correct valuation. Undervaluation may arise either through the carelessness of the importer, or through actual fraudulent design on his part. There is, however, no presumption of fraud where an "additional sum" is imposed for undervaluation.

If the importer knows in advance that in case his goods are undervalued he can recover his additional duties as drawback and then enter them again at the appraised value—in other words, that he can be at no possible loss whether the goods are properly valued or not, provided they are not undervalued more than forty per cent, the very incentive and object of the act is lost, and the expense to the Government in collecting the correct duties is doubled.

That this is the correct view of the matter, and that drawback is not refused on the ground that the additional duty is a penalty, is shown conclusively by the

following language employed in the Customs Regulations of 1884, 1892, and 1899, where identically the same language is used in each instance:

> *Additional duty is a personal debt due by the importer to the United States*, which is not in any way impaired by the fact that the goods have left the possession of the importer and have been transported to another port, and *such additional duty is not subject to rebate or drawback* upon exportation of the goods.
>
> (Customs Regulations of 1884, art. 570; 1892, art. 897; 1899, art. 1426.)

As was said by the court in the case of *Bartlett* v. *Kane* (16 How., 274), "a construction which would give to the fraudulent importer all the chances of gain from success, and exonerate him from the contingencies of loss, would be a great discouragement to rectitude and fair dealing."

As early as 1878 it was held by the Treasury Department (T. D., 3774) that the Secretary of the Treasury had no power to remit "additional duties."

> It is settled by the decision of the Supreme Court that the 20 per cent additional duty is not a penalty or forfeiture which the Secretary has power to remit. Although commonly termed a penal duty, neither the word "penal" nor "penalty" is found in the statute; it is merely termed an "additional duty."

And article 570, Customs Regulations of 1884, and article 897, Regulations of 1892, provide that—

> The Secretary of the Treasury has no power to remit additional duty when it accrues.

The opinion of Attorney-General Olney in 1893 (20 Op., 660) decided that these additional duties were penalties, and as such might be remitted by the Secretary of the Treasury. Thus the uninterrupted practice of the Department charged with the administration of this law was altered, and thereafter the Secretary of the Treasury remitted additional duties, as in case of other penalties incurred under the customs laws.

But this construction of the law was not long allowed to prevail, for in 1897 (act of July 24, 1897, sec. 32, 30 Stat., 212) Congress declared that such "*additional duties shall not be construed to be penal, and shall not be remitted, nor payment thereof in any way avoided* except in case of manifest clerical error, *nor shall they be refunded* in case of exportation of the merchandise, or on any other account, *nor shall they be subject to the benefit of drawback.*"

Here, then, is a recognition by Congress of the fact that these duties were formerly construed to be penal, and a distinct statement of the will of Congress—the continuing will of Congress, for this is the latest legislative expression on the subject—that these duties shall not hereafter be construed to be penal, and that they shall not be subject to the consequences which would result if they were penalties.

Thereupon the Treasury Department immediately reverted to its former practice, and in the next issue of the Customs Regulations, in 1899, article 1426, repeated the exact language of former regulations on the subject.

Thus the changed language of the act of 1897 seems to mean, not that the intention of Congress had changed, but that it was affirming in more positive terms an intention which had always been manifest—the affirmation being called forth simply because of Mr. Olney's reversal of previous views and practice.

IV.

There is no recorded decision which holds that additional duties for undervaluation are penalties. There are two instances in which the courts were obliged to pass upon this very question, and wherein these duties were held to be duties and not penalties.

A brief review is given of all decisions which are thought to bear in any material respect upon the question at issue.

It will be seen that additional duty is referred to under many different descriptions, as a "penalty," "penal duty," "the penalty of an additional duty," "additional duty," "increased duty," "extra duty," and as a "*duty*" (*Grinnell* v. *Lawrence*, 1 Blatchf., 348, 350). Not infrequently, even in the same paragraph, it is referred to both as an additional duty and as a penalty, showing that these expressions are not intended to indicate or pass upon the character of the exaction, whether as a duty or as a penalty. It is therefore quite evident that these various expressions can have but slight bearing on the determination of the question under consideration. In several instances the term penalty or penal duty seems to have been chosen as a convenient method of distinguishing between the increase of the regular duty consequent

upon the advancement of the invoice price to the appraised value, and the additional duty assessed for undervaluation.

Thus *Bannendahl* v. *Redfield* (4 Blatch., 223) and *Bischoff* v. *Maxwell* (Id., 384) speak of the duties as a penalty; *Crowley* v. *Maxwell* (3 Blatch., 383) and *Schneider* v. *Barney* (6 Fed. Rep., 150) use both terms, "additional or penal duties" and "additional duty" or "penalty;" some such cases employ variant expressions for the duty idea, as "increased duty," "extra duty" (*Manhattan Gaslight Co.* v. *Maxwell*, 2 Blatch., 405, 409; *Morris* v. *Maxwell*, 3 Blatch., 143). One case speaks of the "penalty of an increased duty" (*Pings* v. *United States*, 72 Fed. Rep., 260).

The point here made is, that while there has never been a single case squarely deciding that these additional duties or further sums are penalties, there are at least two decisions holding that *they are not penalties, but duties.*

In *Bartlett* v. *Kane* (16 How., 263) there is the nearest approach to a decision that additional duties are penalties. It was an action wherein, among other points not material to the case in hand, the importer sought to recover back the "additional duties" as a drawback, upon reexportation of the goods. The court said:

> An examination of the revenue laws upon the subject of levying additional duties, in consequence of the fact of an undervaluation by the importer, shows that they were exacted as discouragements to fraud, and to prevent efforts

> by importers to escape the legal rates of duty. In several of the acts this *additional duty* has been distributed among officers of the customs upon the same conditions as penalties and forfeitures. As between the United States and the importer, and in reference to the subject of drawback and debenture, it must still be *regarded in the light of a penal duty* (p. 274).

It will be noticed that the decision is not that the additional duty *is* a penalty, but only that it is to be regarded *in the light of* a penal duty, and that in connection with the subject of drawback.

No act has been discovered wherein additional duty has been distributed to officers of the customs upon the same conditions as penalties and forfeitures. Undoubtedly it was the early practice to distribute additional duties for undervaluation in that manner, but it was presumably under the general provisions of section 69 of the act of August 4, 1790 (1 Stat., 177), and of section 91 of the act of March 2, 1799 (1 Stat., 697), providing—

> "That *all* fines, penalties, and forfeitures recovered by virtue of this act," shall be distributed, etc.

In *Ring* v. *Maxwell* (17 How, 147), the court refused to pass upon the question whether the "additional duties" levied under section 8 of the tariff act of July 30, 1846, were or were not penalties, stating that it was unnecessary,

> because we are all of the opinion that whatever may be the nature of the sum levied as addi-

> tional duties * * * they are not distributable as penalties.

In *Stairs* v. *Peaslee* (18 How., 521, 530), which is cited in the brief for the plaintiff in error (p. 32) with erroneous statements and inferences, the court simply held that—

> after that construction [granting to an importer the privilege of making additions to invoice value] has been thus sanctioned, impliedly, in judicial proceedings in this court, *and acted on for so many years* (1846–1853) by all the parties interested, the court thinks it ought to be regarded as settled, and that what has been done under it ought not to be disturbed.

In *Swanston* v. *Morton* (1 Curt., 294) the court said:

> It is true the tariff act denominates it additional duty, but it clearly appears, from the circumstances under which it was to be levied, that *it was an additional duty, by way of penalty*, for not declaring the true value. And if it were necessary to decide upon the strictly technical term appropriate to such a demand, I am by no means clear that it would not be the word penalty. But it is not necessary to go to this length (p. 296).

The court in *Passavant* v. *United States* (148 U. S., 214, 221) declined to decide the point, viz:

> It is wholly immaterial whether they are called additional duties or penalties. Congress had the power to impose them under either designation or character (p. 221).

From *Howland* v. *Maxwell* (3 Blatchf., 14[illegible]: and see

also *Carnes* v. *Maxwell*, id., 420)—permitting an importer to amend his entry and avoid additional duty, because there was no fraudulent undervaluation and the corrected invoice was produced before appraisal—it is very evident that if the additional duty were a penalty, or in its nature punitive, no subsequent act of the importer could have been allowed by the court to avoid the penal consequences of his act.

United States v. *Collier* (3 Blatchf., 325, 348) is one of the two cases where the question whether additional duties are duties or penalties was directly before the court, and where it was decided that they are duties.

The action was to recover balance due the United States from defendant on his official bond as collector. Among various credits claimed by defendant was one for $14,000, being a moiety of a sum collected by him for "additional duties" of 20 per cent ad valorem for undervaluation, to which he would have been entitled had the "additional duties" been a penalty. This claim had already been disallowed by the Treasury Department. The court said:

> We consider the case of *Ring* v. *Maxwell* (17 How., 147) as determining that the sum so demanded by the defendant *did not accrue from fines or penalties, but was composed of duties chargeable by law on merchandise imported.* Accordingly, defendant has no legal claim to that sum.

"*This case was taken to the Supreme Court by writ of error, and the judgment of the circuit court was affirmed* by a divided court. For that reason the case does not

appear in the reports of the Supreme Court." (See note to this case, 3 Blatch., 325.)

Maillard v. *Lawrence* (3 Blatch., 378, 381) is the second case directly in point where it was necessary for the court to decide this very question.

The action was for the recovery of an alleged excess of duties, including an additional duty of 50 per cent arising under section 17 of the act of August 30, 1842 (5 Stat., 564). Objection was made on the part of the Government as to the form of the protest regarding the 50 per cent additional duty. The importer's contention against this was that additional duty was a penalty and that accordingly the provision of law as to protest did not apply. As to this defense the court said:

> *We do not accede to the proposition* of the plaintiffs that the 50 per cent added to the regular duties may be recovered by them without protest on the ground that it is a penalty. *We regard it as an increase*, in the contingency specified, *of the duties chargeable on the importer*, and, accordingly, are of opinion that *the importer must pursue the same course, in respect to that incident, as to the principal*, and can not recover it as a separate demand and cause for action, but only upon protest, as required by the act of 1845.

And so with regard to the case in hand, the "further sum" imposed *should be regarded as an increase of duties chargeable on the importer, and accordingly the United States should pursue*, and did pursue, the same course

as regards the procedure incident to *its recovery as for the recovery of regular duties.*

This same question as regards protest also arose in the case of *Falleck* v. *Barney* (5 Blatchf., 38, 1862), which was an action to recover back additional duty claimed to have been illegally exacted. The goods having been libeled and acquitted in a previous action, it was claimed that the collector had exhausted his authority and could not afterwards collect the "additional duty," but this objection was not stated in the protest. The court said:

> But if this were a valid objection to the exaction of *additional duty*, it should have been stated in the protest. It has been repeatedly decided that no objection can be made in an action of the present character to the validity of the duties demanded, which is not distinctly and specifically set forth in the protest. * * * *The statute which requires the grounds of objection to the payment to be set forth in the protest applies to this additional 20 per cent as well as to the ordinary rate of duty.* This is well settled (p. 39).

Protest, then, is a prerequisite to the recovery of additional duty, but is not required in case of a penalty.

Belcher v. *Lawrason* (21 How., 251, 256, 257) speaks of the "increased duty in case of undervaluation;" and *Kriesler* v. *Morton* (2 Curt., 239) says that additional duties paid under section 8 of the act of 1846 were held to be "*paid as and for duties*," and protest a prerequisite to the recovery of such duties.

In *United States* v. *25 Cases Cloth* (Crabbe, 356, 385, 386) the question was whether the additional duty

provision of the act of 1818 (*ante*) was a repeal of the provision of section 66 of the act of March 3, 1799, imposing forfeiture by reason of a false invoice Here Judge Hopkinson held to the contrary, and in his charge to the jury said:

> *The statutes do not relate to the same matter;* they describe and provide for dissimilar cases; *the first for a false invoice with a design to evade duties*—that is, *with a fraudulent intention—the other for an undervaluation of the goods without any such design.* It is obviously just and reasonable that the penalty in the former case should be an entire forfeiture of the goods, but that the error in the latter should be repaired by imposing an *additional duty* on them. *This act, then, of 1818, and all the provisions in it for appraisement, have for their object the ascertainment of duties,* while the law of 1799 inflicts forfeiture for a designed fraud.

This is the essential fact which we are endeavoring to show, viz, that the statutes in regard to the recovery of additional duties for innocent undervaluation and those which refer to fraudulent undervaluation "*do not relate to the same matters; they describe and provide for dissimilar cases.*" And inasmuch as they provide for dissimilar cases, they are recovered in a dissimilar manner. One is treated as a duty and is collected as such; the other is treated as a penalty and is enforceable as such in the district court.

In *United States* v. *Sixty-seven Packages of Dry Goods* (17 How., 87) this court also pointed out the distinction between additional duties imposed in case of

undervaluation where there is no question of fraudulent intent and forfeiture where there is an intent to evade duty.

> *This additional duty is imposed* in case the appraised value exceeds the invoice price of the goods 10 per centum, *irrespective of the question of fraudulent intent.* Undoubtedly if this additional duty has been levied upon the goods by the Government, it can not forfeit them under the 66th section: *but, if the collector is satisfied that the undervaluation in the invoice has been made with intent to evade the duties, instead of levying the additional duty a forfeiture may be declared.* * * * We are satisfied that there is no provision in the act of 1842, or in any of the duty acts, operating as a repeal of the 66th section of the act of 1799.

In the later cases arising under the amendments of 1897 to the customs administrative act (e. g., *United States* v. *Gray*, 107 Fed. Rep., 104) it is held that additional duties must be treated in precisely the same way as regular duties.

Aside from the special provision of the act of 1897 that additional duties shall not be construed to be penal, the distinctions made in this act between undervaluation not presumed to be fraudulent and fraudulent undervaluation involving forfeiture are precisely the same as in the act of 1890, the only difference being in the amount of the additional duty imposed.

V.

Distinctly different lines of procedure and incidents are involved where "additional duties" or "further sums" are imposed, and where penalties and forfeitures are incurred under the customs laws.

One of the best methods of determining whether these "further sums" were intended by Congress to be considered as penalties or duties is a consideration of the setting of incidents with which they are surrounded and the method outlined for their recovery. If the incidents are those of a duty, and the method of collection similar to that for the collection of a duty, and particularly if this is placed in contrast with the action required of the collector in recovering penalties and forfeitures for violations of the customs laws, then it may reasonably be inferred that Congress intended that the direct connection between the regular duties and the "further sums" in the matter of collection shall also continue to the next stage in the effort for recovery in case it becomes necessary to institute suit.

Section 7 of the customs revenue act of June 10, 1890 (26 Stat., 134), under which this action is brought, provides that—

> If the appraised value of any article of imported merchandise shall exceed by more than ten per centum the value declared in the entry, *there shall be levied, collected, and paid*, in addition to the duties imposed by law on such merchandise, *a further sum*, etc.

The collection of this sum is performed by the collector, and its amount is ascertained by liquidation,

the same as regular duties. As contrasted with this, where the undervaluation has reached the point where it is presumptively fraudulent and forfeiture accrues, it is provided that—

> If such appraised value shall exceed the value declared in the entry more than forty per centum, such entry may be held to be presumptively fraudulent, and *the collector of customs may seize such merchandise and proceed as in cases of forfeiture for violations of the customs laws;* and in any legal proceedings which may result from such seizure the fact of such undervaluation shall be presumptive evidence of fraud.

The collector of customs may seize such merchandise *and proceed as in case of forfeiture* for violations of the customs laws. Section 3084, Revised Statutes, provides that all cases where fines, penalties, or forfeitures have been incurred under any law of the United States, the collectors of customs shall report the matter to the district attorney within ten days for the institution of forfeiture proceedings. Here, then, is a marked distinction. "Additional duties" are liquidated and collected by collectors of customs the same as ordinary duties; but when penalties and forfeitures are incurred under the customs laws, the matter is not dealt with by him at all, but is reported to the district attorney, the goods leave the possession of the collector and are taken into custody by the United States marshal, and legal proceedings are instituted in the district court.

If additional duties are penalties, then it has been

the duty of collectors all along to report these matters to the district attorneys. Section 3084, Revised Statutes, provides that "The several collectors of customs *shall report* within ten days," etc., and if any collector shall fail to report such cases, then "*such collector's right to any compensation, benefit, or allowance in such case shall be forfeited to the United States.*" Evidently these additional duties have not been understood by the collectors to be penalties within any such meaning as is contended by the plaintiff in error, or these matters would regularly have been reported to the district attorneys.

If additional duties are penalties, then collectors of customs have been collecting penalties instead of duties, and importers have not had the benefit of a legal proceeding to ascertain whether penalties have been actually incurred. It is the duty of collectors to collect duties and not penalties, and the statutes could hardly give them authority to collect penalties within the meaning of section 563, Revised Statutes, giving the district court jurisdiction of all suits for penalties and forfeitures incurred under any law of the United States.

In the first branch of undervaluation burdens the presumption is of innocence; in the second the presumption is of guilt.

In the first instance, the additional duties "shall *only apply* to the particular article or articles in each invoice which are undervalued," a further evidence that there is no presumption of wrongdoing; in the second, the forfeiture involves the whole entry. It is

provided in this section that "the forfeitures provided for in this section shall apply to the whole of the merchandise or the value thereof in the case or package containing the particular article or articles in each invoice which are undervalued."

The words "There shall be *levied, collected, and paid a further* sum," immediately afterwards described as "*the additional duties*," convey the idea of civil liability as for debt; and the customs regulations repeatedly state that "*additional duty is a personal debt due by the importer to the United States*" (Customs Regulations of 1884, art. 570; 1892, art. 897; 1899, art. 1426); whereas the words "*presumptively fraudulent, and the collector of customs may seize such merchandise and proceed as in cases of forfeitures for violations of the customs laws*," can convey no other meaning than that of a penalty. The above is the view of the Treasury Department, and if additional duty is a personal debt due the United States, which it really is, then it certainly can not be a penalty within the meaning contended.

Collectors of customs are not entitled to a moiety of additional duties.

Protest is required as an essential prerequisite in an action for the recovery of additional duties.

The Secretary of the Treasury can not remit additional duties. The statutes have never authorized such remission, and, as before shown, it has been the almost uninterrupted practice of that Department not to remit these duties. The Secretary of the Treasury is, however, authorized to remit fines and forfeitures incurred under the customs laws.

And again: Suppose Helwig had refused to pay the additional *regular* duties accruing because of the increased valuation, how would this suit have been brought? In the circuit court or in the district court? or would there have been two actions—one for the regular duties in the circuit court, and another for the "additional sum" in the district court? There must have been two actions if this further sum is a penalty, for the regular duty could never have been joined in an action for the recovery of a penalty. But is there anything incompatible with the joining of the regular duties and the further sum in a civil action for the recovery of duties? And if such an action were instituted, could it be brought anywhere but in the circuit court? If this feature had been involved in the case, the action would never have been brought to the attention of this court for determination. It is only when the "further sum" is torn from its natural surroundings and incidents that there can be any doubt on this subject.

Congress has all along treated these additional duties in the same connection and in the same manner as regular duties; it has surrounded them with the same incidents, making protest a prerequisite to their recovery, and making them collectible by the collector of customs, like regular duties. There can be no doubt that when it becomes necessary to recover them by suit, Congress intended that they should be recovered in the same manner as regular duties.

VI.

The "further sum" is not punitive in its nature, nor is it imposed because of an offense, strictly speaking; it is designed to secure a more careful valuation of imported merchandise.

The law relating to the collection of additional duties has been a matter of continual growth and development. Primarily the object was to protect the Government from the undervaluation of goods, and it is probable that originally the question whether the undervaluation was the result of innocent or fraudulent intent entered slightly into the consideration of the legislators who framed these laws. It is worthy of note, however, that additional duties have always been imposed and collected in the same manner, viz, as duties and not as penalties. The act of 1890 was at that time the culmination of experience along this line, and is the statute upon which this action is based.

This statute recognizes two facts which should always be taken into consideration in the case of an importation. First, that the valuation of imported merchandise is a matter largely of opinion, and can seldom, if ever, be determined with absolute accuracy. An importer may value his goods correctly, according to his best judgment, and yet if all the appraisers throughout the United States were to pass upon their value, it is reasonably certain that there would be a difference of opinion, some agreeing with the importer as to their value, and others placing a higher valuation. The importer, therefore, is confronted with the fact that if he enters his goods at a port

where the appraisers happen to think as he does, then his goods would be held to be correctly valued; but in case he enters them at some other port where the appraisers are of different opinion, then he would be obliged to pay an additional duty. Secondly, that an undervaluation may be either innocent or intentional, and that, while it is manifestly unjust to punish with a penalty a person who has been guilty of no intentional wrongdoing, it is nevertheless perfectly proper and even necessary that some sort of restriction be placed upon the careless valuation of imported merchandise. Undoubtedly such restrictions operate equally upon the guilty importer as upon the innocent, and have the same deterrent effect upon both; but the statute up to the 40 per cent mark considers the undervaluation innocent and unintentional, and for that reason imposes not a penalty which would have to be recovered in the district court but an additional duty collectible by the collector of customs as an ordinary duty. When undervaluation reaches 40 per cent, the presumption of guilt becomes strong, and for undervaluation of more than 40 per cent the statute deems it presumptively fraudulent and authorizes the seizure and forfeiture of the goods.

Section 7 of the tariff act of 1890 is not, therefore, a nicely graded system of penalties for undervaluation of imported merchandise, and the additional duty is not laid because of a criminal offense, but under the presumption of innocence, and therefore the imposition can not be punitive, for there can properly be no pun-

ishment unless there has first been an offense committed. It is only after the 40 per cent mark is reached that punishment is inflicted. Then the presumption is that of fraudulent undervaluation, which *is* an offense against the customs laws, and the goods are seized and proceeded against, to use the language of the statute, *as for violation of the customs laws*, implying very plainly that the other provisions were not directed against a technical "violation of law."

VII.

The "further sum" is not a penalty within the meaning of section 563, Revised Statutes, giving jurisdiction to the district court.

The circuit court had original jurisdiction in this case.

It is not denied that additional duties and further sums levied for undervaluation of imported merchandise may not, in the broadest acceptation of the term, be described as penalties, but it is denied that these duties or exactions are penalties in a legal sense, as coming within the meaning of section 563, Revised Statutes, which provides that the district court shall have jurisdiction of "all suits for penalties and forfeitures incurred under the law of the United States."

The question may be asked, Can Congress declare an act or exaction of one nature to be something else than it really is? In other words, Has Congress the power to change the quality of an act by merely giving it another name?

Congress, it is true, can not change the quality of an act, but it may determine whether a certain act

constitutes a crime or other offense against the laws of the United States.

As was said by this court in the case of *Passavant* v. *United States* (148 U. S., 214):

> It is wholly immaterial whether they are called additional duties or penalties. Congress had the power to impose them under either designation or character (p. 221).

And what Congress had the power to do, it did do. If there is one thing clearer than any other in the study of this subject, it is that Congress deliberately did intend that these additional duties should be treated as duties and not as penalties. Witness the various expressions of Congress in enacting these laws. Everywhere in the list of these expressions we see repeated the word, "duties," but never once the word "penalty." If these additional duties are penalties, why is it that Congress persistently terms them additional duties, or words of a similar import, conveying the idea of debt for civil liability? If these duties are penalties, why has Congress surrounded them with the incidents of a duty and made it the duty of the collector of customs to collect them the same as other duties? Why not have named them penalties and made them recoverable as such?

Now, there are two kinds of penalties. Penalties which arise from a violation of the criminal laws, punishable by fine, forfeiture, imprisonment, etc., and those arising from a civil offense which are usually in the nature of fines. In common parlance they, too,

are termed penalties; but they are not penalties in the sense that there is anything penal or criminal about the act which they seek to restrain or correct.

For instance, the levying of 1 per cent a month for nonpayment of taxes is a penalty in ordinary acceptation and usage; but it is not a penalty in any sense which would authorize suit therefor to be brought in a court designed for the enforcement of criminal laws. The penalty in such case is that of a debt and it is collectible as such.

The district court deals primarily with crimes and similar offenses, penalties, and forfeitures; and the circuit court with all suits of a civil nature at common law or in equity, including all suits for the collection of import duties. Section 629, Revised Statutes, provides that the circuit courts shall have jurisdiction—

> Fourth. Of all suits at law or in equity, arising under any act providing for revenue from imports or tonnage, * * * except suits for penalties and forfeitures.

It is respectfully submitted that for the above reasons and the reasons heretofore given in this brief, this action was properly brought in the circuit court.

It is a suit at common law, an action of debt wherein the United States is plaintiff. It is also a suit at law arising under an act providing for revenue from imports. Section 629, Revised Statutes, provides that the circuit court shall have original jurisdiction—

> Third. Of all suits at common law where the United States, or any officer thereof suing

under the authority of any act of Congress, are plaintiffs.

The fact that additional duties are an exaction and charge resting upon an importer, which may sometimes be highly onerous, and the "penal" implications used in ordinary language and in judicial decisions to describe this burdensome thing, can not change a customs *duty* into a *penalty* as for a crime or offense. We respectfully submit that the question certified should be answered in the affirmative.

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